No. 20-7253

IN THE SUPREME COURT OF THE UNITED STATES

NANCY COLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is entitled to plain error relief on her claim that a conviction under 21 U.S.C. 960 requires proof of knowledge of drug type and quantity.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Cal.):

United States v. Cole, No. 17-cr-4414 (Mar. 22, 2019)

United States Court of Appeals (9th Cir.):

United States v. Cole, No. 19-50104 (Feb. 9, 2021)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not published in the Federal Reporter but is reprinted at 843 Fed. Appx. 886. The judgment of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 2021. The petition for a writ of certiorari was filed on February 22, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of conspiring to import 500 grams or more of methamphetamine, in violation of 21 U.S.C. 952, 960, and 963, and importing 500 grams or more of methamphetamine, in violation of 21 U.S.C. 952 and 960. Judgment 1. She was sentenced to 120 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-5.

1. In November 2017, petitioner and a friend drove from Southern California to Tijuana, Mexico in petitioner's car. C.A. Supp. E.R. 411-412, 442. Later that day, petitioner and her friend sought to reenter the United States through the Otay Mesa, California port of entry. Ibid. At the port of entry, a drug dog alerted to the gas tank area of petitioner's car, and an officer of U.S. Customs and Border Protection (CBP) referred petitioner and her friend for secondary inspection. Id. at 135-143. That inspection revealed 29 vacuum-sealed packages containing 12.3 kilograms of methamphetamine hidden in the gas tank. Id. at 143, 146, 160-161. CBP officers arrested petitioner and her friend and seized two cell phones belonging to petitioner. Id. at 143, 235-236.

In December 2017, a special agent with Homeland Security Investigations (HSI) obtained warrants to search the contents of petitioner's phones. C.A. Supp. E.R. 143, 235-236. The search

revealed text messages and a history of phone calls between petitioner and two individuals -- "Pacheco" and "An La" -- that, combined with petitioner's border-crossing history, reflected a pattern of drug smuggling. Id. at 254-284.

2. A grand jury charged petitioner with one count of conspiring to import 500 grams or more of methamphetamine and one count of importing 500 grams or more of methamphetamine. Superseding Indictment 1-2. At trial, petitioner admitted that, when her car was inspected at the port of entry, CBP officers discovered 12.3 kilograms of methamphetamine hidden in the gas tank. C.A. Supp. E.R. 160-161 (Stipulation). She claimed, however, that she knew nothing about the drugs. Id. at 418-419. As for her contacts with Pacheco and An La, petitioner asserted that they were both secret lovers and that she communicated with them about having trysts, not drug smuggling. Id. at 395, 400, 411.

After the parties rested, the district court instructed the jury on the elements of the offenses and statutory penalties charged in the indictment. With respect to the mens rea for the unlawful importation of a controlled substance, the court instructed the jury that "the government must prove * * * beyond a reasonable doubt" that "the defendant knew the substance she was bringing into the United States was methamphetamine or some other federally controlled substance," but that "[i]t does not matter whether the defendant knew that the substance was methamphetamine"

and "[i]t is sufficient that the defendant knew that it was some kind of a federally controlled substance." C.A. E.R. 23; see Ninth Circuit Manual of Model Jury Instructions (Criminal) §9.32 (last updated Mar. 2021) (Manual). With respect to drug type and quantity, which are relevant to enhanced minimum and maximum penalties under 21 U.S.C. 960(b), the court instructed the jury that "[i]f you find the defendant guilty of [unlawful drug importation], you are then to determine whether the government proved beyond a reasonable doubt that the amount of methamphetamine equaled or exceeded 500 grams. * * * The government does not have to prove that the defendant knew the quantity of methamphetamine." C.A. E.R. 24; see Manual §9.16. Petitioner did not object in the district court to those instructions.

The jury found petitioner guilty on both counts. C.A. E.R. 17-18. It also found beyond a reasonable doubt that petitioner's offenses involved 500 or more grams of methamphetamine, which triggered a statutory minimum sentence of 10 years under 21 U.S.C. 960(b)(1)(H). Ibid. The district court sentenced petitioner to 120 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3.

3. The court of appeals affirmed. As relevant here, petitioner contended for the first time that the district court's jury instructions with respect to drug type and quantity were erroneous, asserting that "a defendant must know the drug type and quantity to trigger the enhanced penalties in 21 U.S.C. § 960(b)."

Pet. C.A. Reply Br. 16 (emphasis omitted). She also contended, likewise for the first time, that imposing a ten-year minimum sentence "based on a material element that does not require a culpable mens rea" was "impermissible under the Fifth Amendment." Pet. C.A. Opening Br. 33.

The court of appeals rejected both claims in an unpublished opinion. Pet. App. 1-5. It explained that petitioner's statutory claim was "foreclose[d]" by binding circuit precedent in United States v. Jefferson, 791 F.3d 1013 (9th Cir. 2015), cert. denied, 577 U.S. 1226 (2016), Pet. App. 4, which determine that the government is not "require[d] * * * to prove that the defendant knew the specific type and quantity of the drugs he imported in order to trigger the ten-year mandatory minimum under 21 U.S.C. § 960(b)(1)(H)." Jefferson, 791 F.3d at 1014. The court also observed that it had "recently reiterated" the same position in its en banc decision in United States v. Collazo, 984 F.3d 1308 (9th Cir. 2021), which reaffirmed that, to trigger the statutory minimum penalties under the analogous provisions of 21 U.S.C. 841(b)(1), the government must "prove beyond a reasonable doubt the specific type and the quantity of substance involved in the offense, but not the defendant's knowledge of (or intent) with respect to that type and quantity." Pet. App. 4-5 (quoting Collazo, 984 F.3d at 1329).

Finally, the court of appeals rejected petitioner's reliance on Rehaif v. United States, 139 S. Ct. 2191 (2019). Pet. App. 5.

In Rehaif, this Court held that the word "knowingly" in 18 U.S.C. 922(g) and 924(a)(2), which prohibits possession of a firearm by people in certain enumerated categories, modifies "both * * * the defendant's conduct" (i.e., his possession) "and * * * the defendant's status" as a member of a particular category. 139 S. Ct. at 2194. The court found Rehaif inapposite for two reasons. Pet. App. 5. "First," Rehaif "concerned a statute structured much differently than § 960(b)." Ibid. (citing Rehaif, 139 S. Ct. at 2195-2196). Second, whereas Rehaif "required a mens rea for the one element separating the criminal conduct from otherwise innocent behavior," conviction for unlawful importation of a controlled substance always "requires defendants to knowingly import a controlled substance." Ibid. Section 960(b) "thus does not punish those lacking a culpable mental state." Ibid.

The court of appeals also rejected petitioner's claim that Section 960 violates the Due Process Clause of the Fifth Amendment. The panel reiterated that, "'[s]o long as the defendant 'recognizes that she is doing something culpable, she need not be aware of the particular circumstances that result in greater punishment.'" Pet. 4 (quoting United States v. Flores-Garcia, 198 F.3d 1119, 1121-1122 (9th Cir. 2000), and citing Collazo, 984 F.3d at 1328). "Accordingly," the court of appeals explained, petitioner "was properly convicted and sentenced for importing and conspiring to import 500 grams or more of methamphetamine, even if the government

did not prove her knowledge of those specific facts." Pet. App. 5.

ARGUMENT

Petitioner contends (Pet. 5-22) that a drug conviction under 21 U.S.C. 960 requires proof that the defendant knew the specific drug type and quantity involved in the offense. That contention is foreclosed by McFadden v. United States, 576 U.S. 186 (2015), in which this Court held that 21 U.S.C. 841(a)(1) -- a statute that is analogous to 21 U.S.C. 960 in all relevant respects, as petitioner appears to acknowledge (e.g., Pet. 5) -- "requires a defendant to know only that the substance he is dealing with is some unspecified substance listed on the federal drug schedules." 576 U.S. at 192. And petitioner's further contention (Pet. 22-28) that convictions under Section 960 applying that understanding of the mens rea element violate the Fifth and Sixth Amendment lacks merit. The court of appeals' decision is correct and does not conflict with the precedent of any other court of appeals. This Court has recently and repeatedly denied review of petitions raising similar issues,* and should follow the same course here.

* See, e.g., Salazar-Martinez v. United States, 140 S. Ct. 2517 (2020) (No. 19-6282); Garcia v. United States, 140 S. Ct. 1104 (2020) (No. 18-9699); Proa-Dominguez v. United States, 139 S. Ct. 837 (2019) (No. 18-6707); Dado v. United States, 574 U.S. 992 (2014) (No. 14-383); Dolison v. United States, 540 U.S. 946 (2003) (No. 02-10689); Rodgers v. United States, 536 U.S. 961 (2002) (No. 01-5169); Wood v. United States, 532 U.S. 924 (2001) (No. 00-7040).

1. Petitioner asserts (Pet. 5-22) that 21 U.S.C. 960 requires proof beyond a reasonable doubt that she knew the specific drug type and quantity involved in her offenses. That contention, which is subject to review only for plain error, see pp. 15-16, infra, is foreclosed by McFadden.

a. In McFadden, this Court considered the scope of the knowledge requirement in Section 841(a), which establishes the mens rea requirement for the Controlled Substances Act, 21 U.S.C. 801 et seq., and the Controlled Substance Analogue Enforcement Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. E (1201 et seq.), 100 Stat. 3207-13, under which the defendant in McFadden was convicted. 576 U.S. 189-191. Section 841(a) makes it "unlawful for any person knowingly or intentionally * * * to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. 841(a). Section 841(b) then describes (with certain exceptions) how a person who violates Section 841(a) "shall be sentenced" by specifying different maximum and minimum sentences for particular types and quantities of drugs. 21 U.S.C. 841(b).

McFadden explained that "[t]he ordinary meaning" of Section 841(a) "requires a defendant to know only that the substance he is dealing with is some unspecified substance listed on the federal drug schedules." 576 U.S. at 192. The Court reasoned that, "[u]nder the most natural reading" of Section 841(a), the term "'knowingly' applies" to the term "controlled substance," such

that a defendant must know that he is dealing with "'a controlled substance.'" Id. at 191 (emphasis omitted). And the Court determined that Section 841(a)'s use of the "indefinite article, 'a,'" and the statutory definition of a "'controlled substance' as 'a drug or other substance, or immediate precursor'" listed on a federal schedule, establish that a defendant need "not know which substance" he is dealing with so long as he "kn[ows] he possessed a substance listed on the schedules." Id. at 191-192 (citations omitted). The Court thus approvingly cited court of appeals cases recognizing the limited nature of Section 841(a)'s knowledge requirement. Id. at 192 (citing United States v. Andino, 627 F.3d 41, 45-46 (2d Cir. 2010); United States v. Gamez-Gonzalez, 319 F.3d 695, 699 (5th Cir.), cert. denied, 538 U.S. 1068 (2003); United States v. Martinez, 301 F.3d 860, 865 (7th Cir. 2002), cert. denied, 537 U.S. 1136 (2003)).

McFadden, whose majority opinion petitioner does not mention or cite, forecloses petitioner's claim (Pet. 5) that her conviction required knowledge of "drug type and quantity." Although petitioner was convicted under Section 960 rather than Section 841, her own petition adopts the premise that Section 841 and Section 960 impose the same mens rea requirement. See, e.g., Pet. 5-6 (citing the two provisions in tandem). That premise is correct, as the two statutes are structured very similarly. Section 960(a), entitled "Unlawful acts," contains language similar to Section 841(a): It provides that any person who

violates certain statutes by "knowingly or intentionally import[ing] or export[ing] a controlled substance * * * shall be punished" as provided in Section 960(b). 21 U.S.C. 960(a) (emphasis omitted). Section 960(b), entitled "Penalties," then establishes a graduated series of penalties based on drug identity, drug quantity, and other factors, analogous to 21 U.S.C. 841(b) (emphasis omitted).

McFadden's explanation that the knowledge requirement in Section 841(a) applies to the term "controlled substance," and requires the defendant only to "kn[ow] he possessed a substance listed on the [federal drug] schedules," 576 U.S. at 192, therefore applies with equal force to Section 960(a). Just as the term "knowingly" in Section 841(a) does not apply to the drug types and quantities set out in Section 841(b), the term "knowingly" in Section 960(a) does not apply to the drug type and quantity requirements set out in Section 960(b). To be subject to the statutory minimum and maximum penalties set forth in Section 960(b), a defendant need "know only that the substance he is dealing with is" an illegal drug. Ibid.

b. In contending otherwise, petitioner principally relies on a trio of cases that were decided before McFadden and do not call the applicability of that decision into question. Pet. 5-22 (citing Flores-Figueroa, supra, United States v. X-Citement Video, Inc., 513 U.S. 64 (1994), and Alleyne v. United States, 570 U.S. 99 (2013)). Flores-Figueroa, which considered the reach of the

term "knowingly" in the federal prohibition on aggravated identity theft, was cited in McFadden's own discussion of mens rea. 576 U.S. at 191-192 (citation omitted). And X-Citement Video was decided more than twenty years before McFadden and addressed a distinct federal statute governing child pornography.

Petitioner's reliance (Pet. 6, 12, 18) on Alleyne, which does not concern mens rea at all, is also misplaced. Alleyne held that "any fact that increases the mandatory minimum is an 'element' [of an offense] that must be submitted to the jury." 570 U.S. at 103. While that holding requires that drug types and quantities set out in Section 960(b) that trigger higher sentencing ranges be submitted to the jury as a constitutional matter, Alleyne does not suggest that a statutory mens rea requirement in a different subsection applies to them as a statutory matter. See, e.g., United States v. Collazo, 984 F.3d 1308, 1322 (9th Cir. 2021) (en banc); United States v. Dado, 759 F.3d 550, 569-571 (6th Cir.), cert. denied, 574 U.S. 992 (2014); Gamez-Gonzalez, 319 F.3d at 700 (rejecting a similar argument based on Apprendi v. New Jersey, 530 U.S. 466 (2000)).

Petitioner is also mistaken in her assertion (Pet. i, 8, 10-11) that the Court's recent decision in Rehaif v. United States, 139 S. Ct. 2191 (2019), supports her argument. In Rehaif, this Court held that, in a prosecution for unlawful possession of a firearm or ammunition under 18 U.S.C. 922(g) and 924(a)(2), the government must prove a defendant's knowledge of his conduct and

his status (e.g., that he is a felon or an alien illegally or unlawfully in the United States). 139 S. Ct. at 2194. Rehaif did not consider or cast any doubt on McFadden, which was decided only four years earlier. Rather, as the court of appeals explained in this case (Pet. App. 5), Rehaif involved the interpretation of a different statutory scheme, in which Congress set out the penalties for "knowingly violat[ing]" Section 922(g) in Section 924(a)(2), and then included both conduct and status elements within Section 922(g). 139 S. Ct. at 2195-2196. No similar structure exists here. As explained above, see p. 9-10, supra, Section 960's structure is instead analogous to Section 841's: Congress clearly delineated "unlawful acts" and "penalties" in Sections 841 and 960, and required proof of knowledge only with respect to the "unlawful acts" set forth in Sections 841(a) and 960(a). See Pet. App. 5; accord Collazo, 984 F.3d at 1326 (distinguishing Rehaif, in construing the mens rea requirement of 21 U.S.C. 841, based on the same structural difference). Moreover, to the extent that Rehaif's reasoning was informed by the need to "separate wrongful from innocent acts," 139 S. Ct. at 2197, knowingly smuggling a controlled substance into the United States is not "innocent conduct," id. at 2211, even when the defendant does not know "precisely what substance it is," McFadden, 576 U.S. at 192; accord Pet. App. 5; see Collazo, 984 F.3d at 1327 ("Knowingly distributing a controlled substance in violation of § 841(a)(1) is not an 'entirely innocent' act." (citation omitted)).

c. Petitioner does not identify any division in the circuits regarding the mens rea requirement for Section 960. She instead cites two dissenting opinions regarding the mens rea requirement in Section 841. See Pet. 6, 8-9, 12, 17 (citing Collazo, 984 F.3d at 1337-1343 (Fletcher, J., dissenting); Dado, 759 F.3d at 571-573 (Merritt, J., dissenting)). And even before McFadden, the circuits were uniform in rejecting the proposition that the government is required to prove beyond a reasonable doubt a defendant's knowledge of drug type and quantity under Section 841. See Dado, 759 F.3d at 569-571 (collecting cases). McFadden then expressly referenced the uniform position of the circuits with approval. 576 U.S. at 192 (citing cases). The one post-McFadden decision petitioner cites that involved the federal drug statutes -- the Ninth Circuit's recent en banc decision in Collazo -- "reiterated" the consensus position, as the panel observed in this case (Pet. App. 4). Collazo, 984 F.3d at 1329 & n.21 (citing cases from other circuits).

Finally, petitioner repeatedly cites (Pet. i, 6-7, 9-10, 13) then-Judge Kavanaugh's dissenting opinion in United States v. Burwell, 690 F.3d 500 (D.C. Cir. 2012) (en banc), cert. denied, 568 U.S. 1196 (2013). But Burwell, which was decided nearly three years before this Court's decision in McFadden, did not involve Section 960, Section 841, or any other federal drug statute. It presented, instead, the distinct question whether 18 U.S.C. 924(c)(1)(B)(ii), which imposes a mandatory thirty-year sentence

for carrying a machinegun while committing a crime of violence, "requires the government to prove that the defendant knew the weapon he was carrying was capable of firing automatically." Burwell, 690 F.3d at 502. And the Burwell dissent expressly reserved judgment on "how the presumption [of mens rea] applies to a fact that," like drug type and quantity under Sections 841 and 960, "Congress made a sentencing factor but that must be treated as an element of the offense for Fifth and Sixth Amendment purposes." Id. at 540 n.13 (observing that the question was "not presented" in Burwell). No further review of petitioner's statutory claim is warranted.

2. Petitioner's alternative constitutional argument likewise does not warrant further review. Petitioner asserts (Pet. 22-28) that, if Section 960(b) does not require proof of knowledge of drug type or quantity, "the ten-year mandatory minimum penalty imposed under 21 U.S.C. § 960(b)" violates the Fifth and Sixth Amendments. Pet. 22 (emphasis omitted). Petitioner's claim rests on a mistaken premise. Section 960 neither creates "strict criminal liability" nor "'eliminat[es]"' the "'element of criminal intent,"' as petitioner asserts. Pet. 26 (quoting United States v. Wulff, 758 F.2d 1121, 1125 (6th Cir. 1985)). Under Section 960, as under Section 841, the government must establish that the defendant "knowingly or intentionally" committed a prohibited act that involved a "controlled substance." McFadden, 576 U.S. at 191 (citation omitted). Although the government does not additionally

need to prove that the defendant had knowledge of the specific drug type or quantity, that does not create a strict liability crime.

Petitioner does not point to any precedents from this Court or the courts of appeals undermining the constitutionality of the statutory scheme. Instead, he relies on cases considering the constitutionality of criminal statutes that lack a "scienter element." Pet. 25 (citing, e.g., Wulff, 758 F.2d 1121 (considering constitutionality of statute that proscribed the sale of migratory birds without requiring any mens rea); United States v. Engler, 806 F.2d 425 (3d Cir. 1986) (same), cert. denied, 481 U.S. 1019 (1987)); see Pet. 23 (citing Lambert v. California, 355 U.S. 225, 227-228 (1957) (holding that defendant was improperly convicted under a local ordinance for failing to register as a felon where she had no "actual knowledge" of her duty to register and "where no showing [wa]s made of the probability of such knowledge")). Those cases are inapposite because Section 960 indisputably includes a scienter requirement, specifying that the offense requires "knowingly or intentionally import[ing] or export[ing] a controlled substance." 21 U.S.C. 960(a)(1).

3. In any event, even if the knowledge element of Section 960 otherwise warranted this Court's consideration, this case would not be a suitable vehicle to consider that issue because petitioner's claim is reviewable only for plain error. In its briefing before the court of appeals, the government explained

that plain error review applied because petitioner failed to object to the jury instructions in the district court. Gov't C.A. Br. 11-12; see Fed. R. Crim. P. 30(d) ("Failure to object [before the jury retires] precludes appellate review, except as permitted under Rule 52(b)."). Petitioner did not contest that she failed to make a timely objection, asserting only that plain-error review did not apply because circuit precedent "foreclosed [her] argument at the time of [petitioner's] trial." Pet. C.A. Reply Br. 17. But that assertion is unavailing because this Court has found plain error review applicable even when "near-uniform precedent both from this Court and from the Court of Appeals" was contrary to defendant's legal argument. Johnson v. United States, 520 U.S. 461, 467-468 (1997).

Because the failure to require proof of knowledge of drug type or quantity is consistent with every court of appeals to consider the issue -- and with this Court's decision in McFadden -- even if there were "error" below, it could not be considered sufficiently "clear" or "obvious" to satisfy the demanding requirements of plain error review. United States v. Marcus, 560 U.S. 258, 262 (2010); cf. United States v. Williams, 469 F.3d 963, 966 (11th Cir. 2006) (per curiam) (no plain error even when there is no controlling case law and circuits are in conflict); United States v. Teague, 443 F.3d 1310, 1319 (10th Cir.) (same), cert. denied, 549 U.S. 911 (2006). For that reason alone, further review is unwarranted in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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